

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

7-21576
76-7174

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7174

COASTAL STATES GAS CORP.,
Plaintiff-Appellant,

against

ATLANTIC TANKERS, LTD.,
ATLANTIC TANKERS, LTD.—MONROVIA,
ST. PAUL MARINE TRANSPORT CORP.,
Defendants-Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

BRIEF DEFENDANT-APPELLEE
ATLANTIC TANKERS, LTD.

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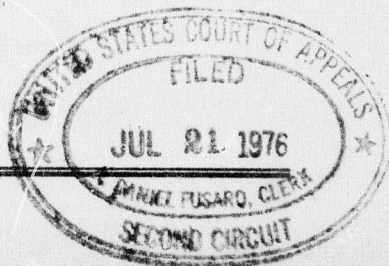


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Defendants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF DEFENDANT-APPELLEE
ATLANTIC TANKERS, LTD.**

Issue Presented for Review

Does a guarantor of its wholly owned subsidiary's obligations under an assignable contract of charterparty remain bound by its guaranty when the owner of the vessel, with the charterer's (subsidiary's) consent, assigns its interest in the charterparty without alteration of the charterparty obligations?

Statement of the Case

Plaintiff-Appellant Coastal States Gas Corporation (hereinafter Coastal) commenced suit in the United States District Court for the Southern District of New York seeking a declaratory judgment against defendant-appellee, Atlantic Tankers, Ltd. (also known as Atlantic Tankers, Ltd.-Monrovia, hereinafter Atlantic), owner of the m/v St. Peter, and against a former owner, St. Paul Marine Transport Corp. (hereinafter St. Paul) as to its duty to participate in an arbitration as guarantor of a contract of charterparty breached by its principal. Coastal subse-

quently moved for an order restraining Atlantic from naming an arbitrator on Coastal's behalf, which motion was denied by order of Judge Inzer B. Wyatt dated March 19, 1976. The order granted Atlantic's cross-motion for consolidated arbitration among and between Coastal, as guarantor, Foreign Energy Tankers, Inc. (hereinafter FETI), its subsidiary, as charterer and Atlantic, as owner, in accordance with the obligations contained in the pertinent charterparty and the guaranty of that charterparty. It is from this order that Coastal appeals.

Statement of Facts

By written charterparty dated August 2, 1973, Saint Paul time chartered its vessel St. Peter to FETI for a term of about three years (Appendix 25a-38a).

By letter agreement dated September 14, 1973, Coastal guaranteed FETI's performance as charterer (Appendix 44a). Coastal is the parent company of FETI, as evidenced by Coastal's 10-K statement for 1974 and by data forming part of a Coastal loan application in 1976, both on file with the Securities and Exchange Commission (Appendix 39a-43a).

By addendum No. 1 to the charterparty dated April 15, 1974, FETI consented in writing to the transfer of the St. Peter from her original owner, Saint Paul, to Union Carriers Corporation-Monrovia (Appendix 24a). From that date forward Union became responsible for the shipowner's obligations under the charterparty. The addendum also provided:

"All other terms, conditions and exceptions of the charterparty to remain unchanged."

Neither the obligations of the charterer, FETI, nor of the owner, Union, were altered in any way by this addendum.

Similarly, by addendum No. 2 dated August 25, 1975, FETI agreed to the transfer of the vessel from Union to Atlantic, which thereafter assumed the owner's obligations (Appendix 23a). Again the addendum provided:

"All other terms, conditions and exceptions of the charterparty and addendum No. 1 to remain unchanged."

Again, the obligations of charterer and owner were not altered by this addendum.

The above changes of ownership were specifically contemplated by the charterparty Coastal agreed to guarantee. Clause 45 of the charterparty provided (Appendix 31a):

"Owners shall not change ownership and/or flag of the vessel without prior written approval of Charterer."

As noted, FETI approved both changes of ownership. While Coastal did not separately endorse each addendum as guarantor, it is a reasonable inference that it knew of them, being FETI's corporate parent.

On October 9, 1975, FETI purported to cancel the charterparty, alleging deficiencies in the vessel's performance. Atlantic contends this cancellation was wrongful and accordingly demanded arbitration with FETI pursuant to Clause 55 of the charterparty calling for arbitration in New York of "any and all differences and disputes of whatsoever nature arising out of the charter." (Appendix 32a).

On January 2, 1976, Atlantic notified Coastal of FETI's default in its obligations under the charterparty and demanded arbitration against Coastal as guarantor (Appendix 45a).

In response to this notice and demand served upon Coastal, the within action was commenced on February 2, 1976 by Coastal in the Court below, seeking relief by way of declaratory judgment and, by motion on February 6, 1976 preliminary injunction enjoining Atlantic from proceeding to name an arbitrator on Coastal's behalf (Appendix 1a-8a).

By order dated March 19, 1976, after a hearing held on March 5, 1976, Judge Wyatt denied plaintiff's motion for a preliminary injunction and in accordance with Atlantic's oral cross-motion, ordered Coastal to participate in a consolidated arbitration of disputes among and between Atlantic, Coastal and FETI before a panel of five arbitrators (Appendix 46a-48a). It is this order which is the subject matter of Coastal's appeal herein (Appendix 49a).

In its brief (Brief, pp. 2-3, 5-6) Coastal attempts to justify Charterer's precipitous decision to cancel the charterparty by alleging poor performance on the part of the vessel. But the question as to who was in breach of charterparty is not before this Court since that issue properly is reserved for determination by the arbitrators.

Although in the lower court Coastal disputed jurisdiction to order consolidated arbitration among and between a guarantor, a charterer and an owner, it evidently now concedes this issue, as it must, under the authority of *Compania Espanola De Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F. 2d 966 (2nd Cir., 1975), cert. denied. See also *Coastal States Gas Corp. and Foreign Energy Tankers, Inc. v. Century Tankers, Ltd.*, 75 Civ. 2172 (S. D. N. Y., May 23, 1975) (Judge Ward's comprehensive opinion not officially reported, copy printed in appendix to this brief) involving the same charterer and guarantor concerning FETI's unilateral declaration of charterparty frustration. Virtually identical guaranty and arbitration provisions were involved in that dispute.

Accordingly, the only issue to be determined by this Court is whether Coastal is relieved of its obligations as guarantor by reason of not having formally assented to the assignment of the charterparty where its wholly-owned subsidiary had in fact given its consent. We submit that the District Court properly denied Coastal's motion for a preliminary injunction and ordered the parties to consolidated arbitration. Coastal's guaranty passed with the transfers of the charterparty as an incident to it, and the circumstances of the transfers did not discharge Coastal from its obligation as guarantor.

ARGUMENT

POINT I

The order of the Court below is not appealable.

Judge Wyatt's order denied Coastal's motion for an order enjoining arbitration and granted Atlantic's cross-motion for a consolidated arbitration and/or a stay pending arbitration (Appendix 46a-48a).

In precisely the same situation, this Court in the appeals of *Coastal States Gas Corp. and Foreign Energy Tankers, Inc. (FETI) v. Century Tankers, Ltd.*, Appeal Nos. 75-7342 and 75-7343 (2d Cir., June 24, 1975), granted without opinion, Appellee Century's motion to dismiss the appeals on the ground that Judge Ward's opinion was interlocutory thus non-appealable.

In *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F. 2d 966 (2nd Cir., 1975), this Court stated that an order directing the parties to arbitrate was appealable as final.

We submit that the Court reversed, without so holding, its determination in *Coastal States, et al. v. Century Tankers*, supra, as well as its decision in *Penoro v. Rederi A/B Disa*, 376 F. 2d 125 (2d Cir., 1967), cert denied *Rederi A/B Disa v. Cunard Steamship Co.*, 389 U.S. 852 (1967), in which the Court refused to permit the appeal from a stay of an action granted pending arbitration.

As the instant case is an action cognizable in Admiralty as appears from the allegations of Coastal's complaint below, and as Coastal sought, and was denied, the equitable relief of a declaratory judgment as to its liability under the guaranty and an injunction restraining arbitration, the *Enelow* doctrine adopted by this Court in *Penoro*, supra, is applicable. To the extent *Compania Espanola de Petroleos* rejected this doctrine in Admiralty cases, we submit it was incorrectly decided.

As a matter of policy, an appeal at this stage of the litigation, in which resort to the Court will again be available at the confirmation proceeding subsequent to arbitration (resulting in a judgment on the award), is unnecessary to protect the interests of the parties. On the contrary, permitting appeal at this stage produces the unfortunate result of resolving the dispute in piecemeal fashion, delaying the arbitration and costing greater time and expense to all concerned.

Under the circumstances, the Court should consider whether the precedent of *Compania Espanola de Petroleos* supra, is in the best interests of court management or for that matter in the best interests of the parties.

POINT II

Assignment of the charterparty to Atlantic, with FETI's consent did not discharge Coastal's guaranty.

Change of Ownership Contemplated by the Charterparty Did Not Discharge Coastal's General Guaranty

Ownership of the St. Peter was transferred twice. The transfers took place with the approval of FETI as charterer in the manner specifically provided for by Clause 45 of the charterparty. These transfers in no way altered FETI's principal obligations or liabilities as charterer, nor did they affect Coastal's obligations or liabilities as guarantor. Significantly also, the obligations of the owners were not affected by the transfers, as evidenced by the language of Addenda Nos. 1 and 2 to the charterparty which state (Appendix 23a-24a):

"Atlantic Tankers Ltd.-Monrovia hereby assumes and agrees to be liable for the faithful performance of the obligations of owner under the charterparty, from the time that title is transferred to them as fully and with the same force and effect as if Atlantic Tankers Ltd.-Monrovia had originally been named in the charterparty."

The rule to be applied in this case is that a general guaranty of the kind given by Coastal is assignable and passes as an incident of the principal obligation, provided that the principal obligation is assignable, whether or not the guarantor assents to

the assignment. Thus Spencer, *The Law of Suretyship* (1913) § 113, states:

"As a technical surety is bound with his principal upon the same contract for the same thing, if the contract of the principal, though nonnegotiable, is nevertheless assignable by the rules of law as to assignability, its assignment carries with it the liability of both principal and surety."

As to who may enforce and under what conditions the guaranty may be utilized by the assignee-obligee, Spencer states:

"By weight of authority . . . , a guaranty is assignable . . . as not being personal in its character, and can be enforced by the same person who can enforce the principal obligation [citations omitted] unless it manifests a plain intent to restrict the guarantor's liability to the original creditor" [citations omitted].

Coastal argued in the Court below, and we agreed, that the law of New York, the state with the most significant contacts governs this dispute; the contract of charterparty was drafted and executed in New York and arbitration in accordance with Clause 55 of the charterparty is to take place in New York. Consequently, arbitration pursuant to Coastal's guaranty will also take place in New York. We submit that New York law should be applied pursuant to well-recognized choice of law principles. *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1930), *Klaxon Co. v. Stentor Mfg. Co.*, 313 U. S. 487 (1941), *Auten v. Auten*, 308 N. Y. 155 (1954).

Coastal contends in its brief (Brief, pp. 17-20) that both the charterparty and the guaranty were personal in nature, thus non-assignable. This is contrary to the established facts. The legal conclusion implicit in the contention is also unsupported by the cases referred to in Coastal's brief. We submit that both the charterparty and the guaranty were assignable.

(a) The Charterparty was Assignable.

As previously noted, the parties specifically contemplated the possibility of transfer of ownership and FETI, in fact, consented to the changes of ownership in the specific manner called

for by Clause 45. Coastal's contention that the charterparty is non-assignable simply disregards the effect of this clause.

Where such a clause is contained in a contract, the surety is presumed to have consented to the assignment. In *Morgan v. Smith*, 70 N. Y. 537 (1877), a lease contained a clause similar to the clause herein that the lessees would not assign the lease "without the written consent" of the lessor. The sureties of the lessee sought to avoid their obligation on the ground that assignment (reletting) of the lease was made without their knowledge, notice or consent. The Court held that the sureties were not discharged (537):

"There was implied [by the above lease provision] that with that written consent [of the lessee] there might be an assignment, or letting or underletting by the lessees. The sureties knew, or were bound to know this when they executed their guaranty. Hence it would not operate to discharge them from their liability, that the plaintiff should give such a written consent."

This rule was followed in *American Surety Co. of New York v. United States*, 112 F. 2d 903 (10th Cir. 1940), in which the court, citing *Morgan*, stated (906):

"When a bond is given to guarantee the performance of the obligations of a lease, and the lease, by its terms, is assignable, and the bond contains no provision relieving the surety in the event of an assignment, the surety is not discharged by an assignment made without its consent."

(b) The Guaranty was Assignable

Coastal's assertion that the guaranty is personal (Brief, pp. 17-20) likewise must fail notwithstanding the fact that it is addressed to the original vessel owner St. Paul. A guaranty is assignable with the principal obligation unless it clearly appears that the instrument is "special", that is, the guarantor relies upon a personal trust in the original recipient and in him alone. In *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 379 (1888), defendant guaranteed a mortgage payable to Nelson F. Stillman. Stillman assigned the mortgage to plaintiff. Following default plaintiff sued on the guaranty. The guarantor contended that the assignment of the mortgage, to which he had not consented,

voided the guaranty. The New York Court of Appeals rejected this defense:

"There was no agreement and no conversation that the effect of the guaranty was to be lost in case Nelson F. Stillman assigned the mortgage. It is true that a guaranty could be so drawn as to be personal and to have force and effect only as to the person to whom it is given, and so as not to be transferable or assignable to any other person. But in order thus to limit a guaranty the language should be plain and peculiar, and the intention of the parties should not be left in uncertainty. Here, by the plain language, there is an absolute guaranty of the payment of the mortgage, and it is described as a mortgage assigned to Nelson F. Stillman, and there is no limitation of the guaranty to him personally. But even if the guaranty should be construed as a guaranty of payment to Nelson F. Stillman, it would yet be a guaranty which he could assign with the mortgage. Like any other promise made to him, it could be assigned and could be enforced by any party to whom it was assigned." 109 N. Y. at pp. 480-481.

In *Sutter v. Nenninger*, 115 Misc. 359, 189 NYS 662 (Kings County, 1921), aff'd 204 A. D. 837, defendant guaranteed a mortgage in favor of the Sutter Company which thereafter assigned the mortgage to plaintiff. The Court held that the guaranty was fully assignable by the original beneficiary, and defendant remained liable under it:

"Defendant further contends the contract is a special guaranty made to the Sutter Company and hence not assignable until a cause of action thereon has arisen. *There is not, however, any provision in the lease restricting the assignment thereof by the lessor*, and the language of the guaranty contained in the mortgage does not contemplate or create a trust that is personal to the promise. Hence the guaranty is not special and the cases cited by defendant do not apply." 115 Misc. at p. 362 (emphasis added).

See also *Everson v. Gere*, 122 N. Y. 290 (1890).

These cases apply *a fortiori* to the case at bar since the charterparty which Coastal guaranteed specifically provided for and contemplated the possibility of transfer of ownership of the vessel during the terms of the charter.

POINT III

Coastal's guaranty passed to Atlantic as an incident of the assignment of the charterparty.

Having demonstrated that both the charterparty and the guaranty are assignable, we turn to a discussion of Atlantic's right to enforce the guaranty.

(1) The Assignment did not increase Coastal's Risk.

Coastal argues in its brief (Brief, pp. 13-17) that it was released from its guaranty owing to the difference in performance between the original owners, St. Paul, and the substitute owners, Atlantic, which "naturally increased Coastal's risk" (Brief, p. 13). But Coastal did not guaranty performance by St. Paul—it guaranteed performance by FETI and FETI's obligations to the owner would not be increased by reason of alleged poor performance of the vessel. If, however, Coastal's analysis is incorrect and FETI was not entitled to repudiate (as will be proved at the arbitration) there is no greater risk involved to Coastal since calling upon the guaranty in the event of FETI's breach was precisely the obligation to which Coastal agreed. Nor was the risk of FETI's breaching the contract increased by the change of ownership. The new owner, Atlantic, either met the performance obligations specified in the charterparty or, if it did not, FETI is entitled to enforce its remedies for breach of charterparty. We submit that Coastal's risk as guarantor was not increased one whit by reason of the change of ownership and attendant assignment of the guaranty.

There having been no increase in risk by reason of the assignment, Coastal's reference to the body of case law which holds that a change of principal obligation discharges the surety (Brief, pp. 8-11) is inapposite. An assignment among obligees without more, as Coastal concedes (Brief, p. 14), does not increase the risk and operate as a discharge. The cases relied upon by Coastal all involve changes of principal obligation. *Chapman v. Hoage*, 296 U. S. 526, involved the relinquishment by the obligee of a principal liability depriving the surety of his

right of subrogation; *Reese v. United States*, 76 U. S. 13, involved the indefinite postponement of a criminal trial permitting the accused to appear only for hearings thereby discharging the bail bond which provided that the accused was to appear for trial at the next term of court; *Becker v. Faber*, 280 N. Y. 146, involved an extension of time to repay the mortgage which, as Coastal's brief states, was held on its facts *not* to discharge the guarantor.

In the instant case the ensuing change of ownership created *no* alteration of FETI's principal obligations under the charter-party distinguishing this case from all those cited by Coastal.

(2) Coastal's specific consent was not required for the Guaranty to pass as an incident of the Charter-party.

The law on the enforceability of a general guaranty by an assignee of the principal contract is found in Spencer, *The Law of Suretyship* (1913), § 113:

"... whatever operates as an assignment of the debt will operate, *prima facie* at least, as an assignment of the guaranty on the theory that it is, like a mortgage, an incident thereof, so that whoever may enforce the debt may enforce the guarantee." [citations omitted].

This is wholly consistent with New York law.

The cases cited by Coastal are distinguishable. Coastal's reliance on *Standard Sewing Machine Co. v. Smith*, 51 Mont. 245, 152 p. 38 (1915) is misplaced. That case involved an agency contract of personal service by one Smith. Referring to the contract the court stated "there is no word or expression to make it assignable." The nature of the services were such as to make the contract without a specific assignment clause, unassignable without Smith's consent, which was not obtained. The court noted (39):

"... there is nothing to show that Smith ever in fact knew of the assignment [by the original obligees]. But whether he did or not is of no consequence to the sureties, since of the contract was *in its nature* unassignable without his consent, their consent was similarly requisite to

the establishment of privity between the assignee and them in virtue of the same contract." (emphasis supplied)

Where as in the case at bar, the principal contract by its terms is assignable, the assignment thereof carries with it the security.

Similarly, *Union Properties v. Bogdanoff*, 250 A. D. 282, states that by assigning the deed and mortgage the original obligee lost *its* right to enforce the guaranty. The case does not hold, as Coastal contends, that the guarantor was discharged.

Lumberman's Bank & Trust Co. v. Sevier, 149 Wash. 118, involved a personal guaranty of indebtedness of a specific partnership (obligor), which partnership was terminated and replaced by a successor partnership. In that case, the change in obligor (as distinguished from a change of obligee herein) created for the surety an increased risk of that successor partnership's failure to repay the debt.

The Court in *Northern Minnesota Drainage Co. v. Equitable Surety Co.*, 131 Minn. 243, did not hold as Coastal suggests that the surety was released by the obligor's assignment of the construction contract to Northern. Rather the Court determined that if, on remand, the Court found that Northern was the assignee it could not recover from the surety because it was not, as successor obligor, a beneficiary of the surety contract.

Brill v. Friedhoff, 102 Misc. 565, is likewise inappropriate authority, not only because the decision was reversed on appeal, 184 A. D. 673, 229 N. Y. 547, *aff'ing* Appellate Division, but also because the case deals with the law of estates and trusts as to whether an executor may bind the estate to a new obligation in agreeing to act as guarantor of a lease.

We turn to a discussion of relevant caselaw.

In *In re 24-52 Forty-Fourth Street, Long Island City*, 176 Misc. 249, 26 N. Y. S. 2d 265, 270 (1941) the Court stated:

"It seems to me that the conclusion which I reach herein is obviously in accordance with the general rule that the assignment of a principal obligation carries with it all rights under guarantees and all rights to any security even though said rights are not referred to in the assignment itself."

In that case, the Court held that the trustee of a bankrupt guaranty company (the guarantor) was liable to pay assignees of holders of dividend certificates (the obligees) although the assignments were made without the apparent knowledge or consent of the guarantor.

The leading New York case is *Craig v. Parkis*, 40 N. Y. 181 (1896), involving the assignment of a bond and mortgage to a third party without the assignment of a separate guaranty. With respect to the right of the assignee to enforce the guaranty, the Court stated (40 N. Y. 181, 185):

"Although the guaranty of the defendant was not in terms assigned to the plaintiff, he became entitled to the benefit of it under the assignment of the bond, and the money received thereby. The transfer of the debt to him carried with it, as an incident, all the securities for its payment. He, therefore, had a right to maintain the action."

In *Flank v. Kuhlmann*, 63 Misc. 334 (Sp. Ct., App. Term, 1909) the guaranty provided, in part:

"I do hereby covenant and agree to and with [the original landlord] and her legal representatives that if default shall at any time be made by the said Otto Kuhlmann in the payment of the rent and performance of the covenants in the within lease on his part to be paid and performed that I will well and truly pay the said rent or any arrears thereof."

Kuhlmann, the principal obligor, assigned his lease to a third party without the guarantor's consent and the landlord, the obligee, sold the building to another party while at the same time assigning the lease. Thus, neither the original obligor nor the original obligee remained as parties to the guaranty. It is noteworthy that, as in the case at bar, the landlord (obligee), like the original vessel owner herein, sold and transferred all interest to the property which was the subject of the contract and guaranty. In spite of this, the guarantor was held liable to the new landlord for the outstanding rent.

Thus, as established by the cited cases, transfer of an assignable contract carries with it the guaranty even without specific

consent to the assignment by the guarantor. See also, 38 *Corpus Juris Secundum*, "Guaranty", § 42; *American Surety Co. of New York v. United States*, *supra*; *Morgan v. Smith*, *supra*. It follows that Coastal remained bound by its guaranty and that Atlantic, the new owner, was entitled to arbitrate with Coastal.

Conclusion

The Order of the District should be affirmed.

Dated: New York, New York
July 21, 1976

Respectfully submitted,

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APPENDIX

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

75 Civ. 1999—R. J. W.

FOREIGN ENERGY TANKERS, INC.,

Plaintiff,

against

CENTURY TANKERS, LIMITED,

Defendant.

75 Civ. 2172—R. J. W.

COASTAL STATES GAS CORP. and
FOREIGN ENERGY TANKERS, INC.,

Plaintiffs,

against

CENTURY TANKERS, LIMITED,

Defendant.

**OPINION OF JUDGE ROBERT J. WARD
DATED MAY 23, 1975**

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1999—R. J. W.

FOREIGN ENERGY TANKERS, INC.,

Plaintiff

against

CENTURY TANKERS, LIMITED,

Defendant.

75 Civ. 2172—R. J. W.

COASTAL STATES GAS CORP. and
FOREIGN ENERGY TANKERS, INC.,

Plaintiffs,

against

CENTURY TANKERS, LIMITED,

Defendant.

Defendant, Century Tankers, Limited ("Century"), moves in each of these actions, pursuant to Rule 12(b), Fed. R. Civ. P., for an order dismissing the complaint or, in the alternative, a stay pending arbitration. Plaintiffs in 75 Civ. 2172, Coastal States Gas Corp. ("Coastal") and Foreign Energy Tankers, Inc. ("Foreign"), cross move for an order, pursuant to Rule 65, Fed. R. Civ. P., enjoining defendant from proceeding with arbitration.

By a charter party dated October 4, 1973, plaintiff Foreign chartered the vessel *Euros*, an oil tank ship, from Century for a period of three years and 15 days more or less. In order to induce Century to enter into the charter party, plaintiff Coastal

executed what has been variously characterized as a "letter of guaranty" or "assignment," dated November 26, 1973, undertaking to insure the performance of Foreign, its wholly owned subsidiary. Foreign failed to pay the charter hire for April 1975 when due. On April 14, 1975, Century notified Foreign of its default and gave notice of this default to Coastal. Both Foreign and Coastal denied the default contending that the charter party had been frustrated and, thereby, terminated. On April 21, Century rejected the claim of frustration and, three days later, served both plaintiffs with demands for arbitration. Thereupon, these actions were instituted.

In essence, the respective motions present two questions. First, whether a claim of termination by reason of frustration is arbitrable and second, whether Coastal is compelled, by its undertaking, to arbitrate this dispute. Specifically, plaintiffs contend that if the charter party has been terminated by reason of frustration there is no subsisting arbitration clause for the Court to enforce. Thus, they argue the Court must decide the issue of frustration. Plaintiff Coastal contends that it is not bound to arbitrate because its agreement does not contain an arbitration clause. It, also, argues that its liability for the charter party does not come into existence unless and until Foreign has been found in default either by this Court or by the arbitrators. The Court finds all of plaintiffs' arguments to be without merit.

By paragraph 55 of the charter party Foreign and Century agreed that

"Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of NEW YORK, pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by Owner, one by Charterer and one by the two so chosen."

When one party requests a court to enforce an agreement to arbitrate, such as paragraph 55, the scope of the court's inquiry is limited to whether the parties have agreed to arbitrate the dispute in issue. See *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U. S. 395 (1967); 9 U. S. C. § 3.

The law in this circuit is clear that when an arbitration clause is as broad as the one in the instant case and no question is raised as to the making of the agreement to arbitrate, disputes regarding whether one party is discharged from performance are referable to arbitration. See, e.g., *In re Pahlberg Petition*, 131 F. 2d 968 (2d Cir. 1942); *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 11 (S. D. N. Y.), *aff'd*, 489 F. 2d 1313 (2d Cir. 1973), *cert. denied*, 416 U. S. 986 (1974); *Goldhill Trading & Shipping Co. v. Caribbean Shipping Co.*, 56 F. Supp. 31 (S. D. N. Y. 1944).

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, *supra*, the Supreme Court endorsed the Second Circuit view that arbitration clauses are separable from the contracts of which they are a part and held that the question of fraud in the inducement to enter a contract was arbitrable. In so holding, the Court stated:

"We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." 388 U. S. at 404

The plaintiffs here contend only that performance of the charter generally has been frustrated. There is no suggestion that the arbitration clause particularly has been frustrated. Thus, it follows from *Prima Paint* that the dispute as to whether the charter has been terminated by reason of frustration is for the arbitrators to decide. See *Eastern Marine Corporation v. Fukaya Trading Co.*, 364 F. 2d 80 (5th Cir.), *cert. denied*, 385 U. S. 971 (1966).

General Guaranty Insurance Company v. New Orleans General Agency, Inc., 427 F. 2d 924 (5th Cir. 1970), cited by the plaintiffs is inapposite as in that case both parties sought the court's decision on whether the contract had been terminated by abandonment, thereby waiving arbitration of that issue.

The next question is whether Coastal is to be compelled to arbitrate this dispute. The answer turns on what Coastal agreed to undertake. The November 26, 1973 letter agreement between Coastal and Century recites in pertinent part:

"To induce you to enter into the charter party dated October 4, 1973, (said charter party as the same may hereafter be amended called the "Charter"), with our wholly owned subsidiary Foreign Energy Tankers, Inc., (the "Charterer"), pursuant to which you chartered the oil tank vessel EUROS to Charterer for a period of three years, fifteen days more or less, and in consideration thereof, we agree that if Charterer defaults in the performance of any of its obligations under the charter, we will, upon receipt of notice of such default (i) promptly cause Charterer to remedy such default, or (ii) within four (4) days after receipt of such notice, cause the charter to be assigned to us by Charterer so that effective as of October 4, 1973, we shall be entitled to all the rights and be responsible for all the obligations of Charterer under the charter, as if the charter had originally been made with us as Charterer. If the default is not cured within four (4) days after receipt of such notice, the charter shall be deemed, as provided under (ii) above, to have been assigned to us.

Any default by us under this letter shall also be deemed to be a material default under the Charter. This letter is in addition to, and not by way of limitation upon, any other rights you may have under the Charter, by law or otherwise."

Nothing could be more clear than that Coastal undertook to guarantee performance of all covenants of the charter and did so by making itself a party to it. Coastal did not merely guarantee the payment of the money, as it contends. Thus, although the letter agreement does not contain an arbitration clause, Coastal bound itself to perform all of Foreign's obligations under the charter, including the obligation to arbitrate.

Moreover, the scope of the arbitration covenant of the charter party is not limited, by its own terms, to the original parties to the charter. It, therefore, may be enforced against a third party who has assumed its obligation. In *Lowry & Co., Inc., v. S.S. Le Moyne D'Iberville*, 253 F. Supp. 396, 398 (S. D. N. Y. 1966), appeal dismissed, 372 F. 2d 123 (2d Cir. 1967), Judge Weinfeld stated the law to be applied:

"It is true that a charter party provision for arbitration of disputes which is restricted to the immediate parties or limited to disputes 'between the * * * Owners and the

Charterers,' as was the case in *Import Export Steel Corp. v. Mississippi Valley Barge Line Co.* so heavily relied upon by libelant, does not bind any but the named persons. On the other hand, an agreement to arbitrate all 'disputes * * * arising out of this charater' binds not only the original parties, but also all those who subsequently consent to be bound by its terms." (footnotes omitted)

The arbitration provision in the instant case, in its operative provisions, is quite similar to the one before Judge Weinfeld. The mere fact that the clause provides for appointment of the arbitrators by "Owner" and "Charterer" does not limit the arbitration clause or evince a definite intent to preclude its application to a third party. *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 385 F. Supp. 1155 (S. D. N. Y. 1974).

The cases relied upon by the plaintiffs are inapposite. In these cases, the arbitration agreements were unequivocally limited to the immediate parties. See, e.g., *Production Steel Company v. S.S. Francois L.D.*, 294 F. Supp. 200 (S. D. N. Y. 1968); *Taiwan Navigation Co. v. Seven Seas Merchants Corporation*, 172 F. Supp. 721 (S. D. N. Y. 1959).

Having held that Coastal is bound by the arbitration clause, it remains to determine at what stage in the proceedings its obligation commences. Coastal contends that its duty to arbitrate arises only upon a finding that Foreign has in fact defaulted. The Court holds that Coastal was obligated to arbitrate upon defendant's demand four days after it was given notice by Century of Foreign's default. This is clear from the terms of Coastal's letter agreement. The only condition precedent to Coastal's assuming all of Foreign's obligations is four days notice by Century. Even if the clause were ambiguous, the Court would be required to construe it in a reasonable manner and hold that Coastal was bound to arbitrate on notice of Foreign's default. *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, *supra*.

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Accordingly, plaintiffs' motion for a preliminary injunction is denied and defendant's motions for a stay pending arbitration are both granted.

Settle order on notice.

ROBERT J. WARD
U. S. D. J.

Dated: May 23, 1975

(6646)

Service of three copies of the within (~~Record on Appeal~~)
(~~Case on Appeal~~) (Brief) is hereby admitted this
day of ...JULY/...21..., 1976.

David Stewart.....